OGC HAS REVIEWED.

10 March 1950

MEMORANDUM

SUBJECT: Contract Clause for Conclusive Findings by Agency Representative.

1. A recent decision of the Supreme Court (U.S. v. Moorman, 70 S.C. 288) may be of interest. Although interpretation of the clause in question was related to a construction contract, there is no reason why the principle involved is not equally applicable in other situations.

2. In the Moorman case, a private partnership entered into a contract with the Department of the Army to grade the site of a proposed aircraft assembly plant. A fixed price was set for each cubic yard of grading satisfactorily completed "in strict accordance with the specifications, schedule, and drawings, all of which are made a part hereof * *." A taxiway was shown on the drawings but not located within the plant site described in the specifications. At the Government's request, the taxiway was graded, and the contractor then filed a claim for additional compensation which was denied by the Contracting Officer. The contractor followed the procedure outlined in a special clause in the contract and then appealed to the Secretary of War, whose authorized representative also denied the claim. The special clause was separate and distinct from the usual "Disputes" clause and provided in § 2-16 of the specifications that:

> "If the contractor considers any work demanded of him to be outside the requirements of the contract or if he considers any action or ruling of the contracting officer or of the inspectors to be unfair, the contractor shall without undue delay, upon such demand, action, or ruling, submit his protest thereto in writing to the contracting officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the contractor his decision, in writing thereon. If the contractor is not satisfied with the decision of the contracting officer, he may, within thirty days, appeal in writing to the Secretary of War, whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract. * * *"

3. The contractor contended that § 2-16 in the specifications related only to matters of fact and to that extent was controlled by the regular "Disputes" clause. Since he felt that the "interpretation" was a question of law rather than fact, he did not accept

the finality of the administrative finding, and brought suit in the Court of Claims, which upheld him. In reversing the decision of the lower court, the Supreme Court indicated that parties competent to make contracts are also competent to make mutual agreements controlling both law and fact. "Findings of * * * a contractually designated agent, even where employed by one of the parties, were held 'conclusive unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith'." The court further determined that the parties agreed under § 2-16 of the specifications to accept the findings of a particular person, and the findings might relate to law as well as fact.

4. The case stands for two points of particular interest:

a. Work requirements indicated in drawings, although not a part of the specifications are nevertheless within the obligation of the contract when they are incorporated by reference; and

b. Although the standard "Disputes" clause relates only to questions of fact, the parties may mutually agree that a designated individual can also decide questions of law, at least to the extent of interpreting the contract.

[redacted] 25X1A

cc: Contract Section - Overt
" " Covert